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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-526

FIRST NATIONAL BANK OF FORT COLLINS,
Petitioner,

v.

STATE OF COLORADO, *ex rel.* STATE BANKING BOARD and HARRY BLOOM, State Banking Commissioner and Chairman, State Banking Board,
Respondent,

and ROBERT BLOOM Acting Comptroller of the Currency,
Defendant.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

J. D. MacFARLANE
Attorney General of Colorado
JEAN E. DUBOFSKY
Deputy Attorney General
EDWARD G. DONOVAN
Solicitor General
MARY J. MULLARKEY
First Assistant Attorney General
Attorneys for Respondent
1525 Sherman Street, Room 306
Denver, Colorado 80203
Telephone: (303) 892-3611

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OPINIONS BELOW

The opinion of the District Court for the District of Colorado is reported at 394 F. Supp. 979 (D. Colo. 1975) and is appended to the petition for writ of certiorari as Appendix B. The opinion of the United States Court of

Appeals for the Tenth Circuit, entered on August 20, 1976, is reported at 540 F.2d 497 (10th Cir. 1976) and is appended to the petition as Appendix A.

JURISDICTION

The petitioner asserts jurisdiction under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Is an off-premises electronic banking machine, commonly referred to as a customer-bank communications terminal ("CBCT"), which is operated by a national bank, a branch within the meaning of the National Bank Act?

STATUTES AND RULING INVOLVED

The petitioner sets forth the relevant provision of the National Bank Act, 12 U.S.C. § 36, in Appendix C to the petition. The relevant state statute, C.R.S. 1973, 11-6-101(1) is attached to the petition as Appendix C-2. C.R.S. 1973, 11-2-103(1)(e), also set forth in Appendix C-2 of the petition, was amended on June 26, 1975, and now reads as follows:

> Authorize state banks to engage in any banking activity in which such banks could engage were they operating as national banks at the time such authority is granted so long as such activity is not prohibited elsewhere in this code.

L. 75, p. 373, § 1.

The ruling of the Comptroller of the Currency, 12 C.F.R. 7.7491, is set forth as Appendix C-4 of the petition. That rule was rescinded by the Comptroller on August 23, 1976. See 41 Fed. Reg. 36198 (1976).

STATEMENT OF THE CASE

This action was brought by the State of Colorado against the First National Bank of Fort Collins ("bank") and the Comptroller of the Currency ("Comptroller") seeking declaratory and injunctive relief. On December 12, 1974, the Comptroller issued an interpretative ruling which set forth his opinion that an off-premises CBCT was not a branch as defined in the National Bank Act, 12 U.S.C. § 36(f). His ruling, first published at 39 Fed. Reg. 44416 (1974), was later amended at 40 Fed. Reg. 21700 (1975) in a manner not germane to the issues of this case. The Comptroller's ruling permitted national banks, after complying with certain notice requirements, to establish off-premises CBCTs without regard to state laws regulating branch banking.

The petitioner is a national bank doing business in Colorado. After giving notice to the Comptroller, the bank established a CBCT in a shopping center approximately three miles from its main bank building. The Colorado Banking Board, upon learning of the bank's intention to open the CBCT, conducted an investigation and concluded that the banking machine was a branch operated in violation of state law. C.R.S. 1973, 11-6-101(1) prohibits a Colorado bank from maintaining a branch except for a single detached facility within 3,000 feet of the main bank building.

Subsequent to the Banking Board's determination, this action was filed. The State of Colorado sought to have the

Comptroller's ruling declared invalid and to enjoin the petitioner bank from operating its CBCT. After describing the mechanical functions of the CBCT, the district court analyzed each transaction performed by the CBCT in relation to the three characteristics of the branch described in the statutory definition, 12 U.S.C. § 36(f), to determine whether deposits were received, checks paid, or money lent. The district court found that this court's decision in *First National Bank in Plant City v. Dickinson*, 396 U.S. 122 (1969), compelled it to conclude that the CBCT received deposits. However, the court also found that the other transactions performed by the CBCT did not constitute paying checks or lending money. Thus, the district court held that the CBCT was a branch only with respect to its deposit receiving function and ruled that the bank could continue to operate the CBCT to perform all other transactions.

All parties appealed from this decision to the United States Court of Appeals for the Tenth Circuit, which affirmed in part and reversed in part the district court's decision. The court of appeals agreed with the district court that the CBCT was a branch bank in violation of 12 U.S.C. § 36 because it received deposits. It reversed the district court's conclusion that the other banking transactions performed by the CBCT did not constitute branch banking. In concluding that the withdrawal of funds from savings or checking accounts and the transfer of funds between accounts at the CBCT were "well within" the statutory prohibition on branch banking, the court of appeals relied on the decision of the District of Columbia and Seventh Circuits in cases involving the same issues. *Independent Bankers Association of America v. Smith*, 534 F.2d 921 (D.C. Cir. 1976), *cert. denied* No. 76-258 (Oct. 4, 1976); *Illinois ex rel. Lignoul v. Continental Illinois National Bank and Trust Co.*, 536 F.2d 176 (7th Cir. 1976),

cert. denied Nos. 75-1900 and 76-17 (Oct. 4, 1976). Further, the Tenth Circuit stated:

> Actually, in our view it was not necessary for the trial court in the instant case to find that in permitting withdrawals and transfers of funds, the CBCT fit neatly and precisely into the traditional molds of "checks paid" or "money lent" as those terms are used in 36(f). That section declares that the term "branch" shall *include* any branch place of business where deposits are received or checks paid, or money lent.

Pet. App. at 6 (emphasis in original). Thus, the court found that regardless of the technology used to perform the transactions, all of the services provided by the CBCT were traditional banking transactions prohibited by the statute.

The bank now seeks a writ of certiorari to review the decision of the Tenth Circuit.

REASONS FOR DENYING CERTIORARI

The petitioner in its petition at 8 advised the court of pending petitions for certiorari in cases raising the same issues as are presented here. After the petition was printed, certiorari was denied in the *IBAA* and *Illinois* cases, *supra*. One petition remains pending. *First National Bank in St. Louis v. State of Missouri ex rel. Kostman*, No. 76-392.

The respondent State of Colorado contends that the denials of certiorari in the *IBAA* and *Illinois* cases should be dispositive of the issues raised by the petitioner in this case and that this petition also should be denied. The legal issues presented by this petition are the same as those presented by the prior cases. As we noted above, the Tenth Circuit's opinion relied on the courts of appeals' decision in

the *IBAA* and *Illinois* cases. Further, there is no division of opinion among the four courts of appeals which have considered the question of whether an off-premises CBCT is branch banking. All, including the pending *Missouri* case, have concluded that it is.

Moreover, the petitioner bank in this case presents no new arguments in support of its position. The petitioner appears to advance the same arguments made by the Comptroller in his unsuccessful petition for certiorari in the *IBAA* case. See *e.g.*, Petition at 8.

Finally, and most importantly, we submit that this case was decided correctly by the Tenth Circuit. The legislative history of the National Bank Act, reviewed by this court in *First National Bank of Logan v. Walker Bank and Trust Co.*, 385 U.S. 252 (1966) and in *Plant City, supra*, makes it clear that 12 U.S.C. § 36 was intended to place national and state banks in a position of competitive equality. See *Walker Bank*, 385 U.S. at 261. Under the statute, the decision to permit branch banking is left to the discretion of the state legislatures and Colorado has always prohibited branch banking. The forerunner of the current statute was passed in 1911 and the prohibition on branch banking has remained in effect to the present.

Both the statutory language and the legislative history of 12 U.S.C. § 36 make it apparent that state prohibitions on branch banking were not to be circumvented by a narrow interpretation of the definition of branch. By its terms, the definition of branch is not inclusive. As this court stated in *Plant City*, a branch means at least a place of business at which deposits are received, checks paid or money lent, but the definition may mean more. 396 U.S. at 135. In accordance with *Plant City*, the Tenth Circuit noted that "accepting deposits, or paying checks, or lending money are

not the only indicia of branch banking. The typical bank of the present time provides many other services." Pet. App. at 6. The court of appeals expressly rejected the view of the district court that the technique employed by the CBCT to dispense cash or transfer funds took the transactions out of the definition of branch banking. The court characterized such reasoning as placing undue emphasis on form over substance and giving a restrictive meaning to the definition of branch banking contrary to *Plant City*. *Id* at 5.

In its petition, the bank raises no arguments which were not considered by the Tenth Circuit. Contrary to the bank's assertion at 9 of its petition, the Tenth Circuit's opinion has not cast a "cloud" over banking transactions in Colorado. No Colorado bank other than the petitioner has established an off-premises CBCT and the decision of the Tenth Circuit simply restores the status quo. As a result of this decision, no bank, including the petitioner, is permitted to operate a branch in Colorado.

CONCLUSION

For the reasons stated above, the respondent State of Colorado respectfully requests this court to deny the petition for writ of certiorari.

FOR THE ATTORNEY GENERAL:

MARY J. MULLARKEY
First Assistant Attorney General
Appellate Section

Attorney for Respondent

1525 Sherman Street, Room 306
Denver, Colorado 80203
Telephone: (303) 892-3611